

HOUSE No. 4530

Section 7 contained in the engrossed Bill relative to heating energy assistance and tax relief (see House, No. 4473, amended), which had been returned by His Excellency the Governor with recommendation of amendment (for message, see House, No. 4529). November 23, 2005.

The Commonwealth of Massachusetts

In the Year Two Thousand and Five.

AN ACT RELATIVE TO CONTRACTS FOR ENERGY MANAGEMENT SERVICES.

1 *Whereas*, The deferred operation of this act would tend to
2 defeat its purpose, which is to establish forthwith a heating energy
3 assistance and tax relief program, therefore it is hereby declared
4 to be an emergency law, necessary for the immediate preservation
5 of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Section 11C of chapter 25A of the General Laws, as appearing
2 in the 2004 Official Edition, is hereby amended by striking out
3 subsections (a) to (e), inclusive, and inserting in place thereof the
4 following 12 subsections:—

5 (a) As used in this section, the following words shall have the
6 following meanings:

7 “Eligible”, able to meet all requirements for offerors or bidders
8 set forth in this section including, without limitation, being certi-
9 fied by the division of capital asset management and maintenance
10 as eligible to provide energy management systems services and
11 not debarred from bidding under section 44C of chapter 149 or
12 any other applicable law.

13 “Energy conservation measures”, measures involving modifica-
14 tions or maintenance and operating procedures of a building or
15 facility and installations therein, which are designed to reduce
16 energy consumption in such building or facility, or the installa-

17 tion, modification of an installation in a building or facility which
18 is primarily intended to reduce energy consumption.

19 “Energy conservation projects”, projects to promote energy
20 conservation, including but not limited to, energy conserving
21 modification to windows and doors; caulking and weather-strip-
22 ping; insulation, automatic energy control systems; hot water sys-
23 tems; equipment required to operate variable steam, hydraulic,
24 and ventilating systems; plant and distribution system modifica-
25 tions including replacement of burners, furnaces or boilers;
26 devices for modifying fuel openings; electrical or mechanical fur-
27 nace ignition systems; utility plant system conversions; replace-
28 ment or modification of lighting fixtures; energy recovery
29 systems; and, cogeneration systems.

30 “Energy management services”, a program of services,
31 including energy audits, energy conservation measures, energy
32 conservation projects, or a combination thereof, and building
33 maintenance and financing services, primarily intended to reduce
34 the cost of energy and water in operating 1 or more buildings,
35 which may be paid for in whole or in part, by cost savings attrib-
36 utable to a reduction in energy and water consumption which
37 result from the services.

38 “Energy management systems”, the design and installation of
39 systems or maintenance programs to conserve energy use within a
40 building, including, without limitation, performance-contracting
41 energy saving projects; the installation or modification of new and
42 existing equipment which will reduce energy and water consump-
43 tion associated with heating, ventilation, and air conditioning
44 system, lighting system, building envelope, domestic hot water
45 system, and other energy and water using devices; and the work
46 associated with monitoring and verifying project savings and the
47 study or design of the subject work, whether performed directly or
48 managed through subcontractors.

49 “Energy savings”, a measured reduction in fuel, energy, oper-
50 ating or maintenance costs resulting from the implementation of
51 1 or more energy management services when compared with an
52 established baseline of previous fuel, energy, operating or mainte-
53 nance costs, including, but not limited to, future capital replace-
54 ment expenditures avoided as a result of equipment installed or

55 services performed pursuant to the guaranteed energy savings con-
56 tract.

57 “Guaranteed energy savings contract”, a contract for the eval-
58 uation, recommendation or implementation of 1 or more energy
59 management services in which payments are based, in whole or in
60 part, on any energy savings attributable to the contract.

61 “Person”, any natural person, business, partnership, corpora-
62 tion, union, committee, club, or other organization, entity or group
63 of individuals.

64 “Public agency”, a department, agency, board, commission,
65 authority, or other instrumentality of the commonwealth or polit-
66 ical subdivision of the commonwealth or 2 or more subdivisions
67 thereof.

68 “Qualified provider”, responsible and eligible person able to
69 meet all requirements set forth in this section, and not debarred
70 from bidding under section 44C of chapter 149 or any other
71 applicable law and experienced in the design, implementation, and
72 installation of energy savings measures.

73 “Request for qualifications”, a solicitation directed to qualified
74 providers issued by a public agency to obtain energy management
75 services pursuant to a guaranteed energy savings contract subject
76 to the provisions of this section. The request for qualifications
77 shall include the following:

78 (1) The name and address of the public agency.

79 (2) The name, address, title, and phone number of a contact
80 person.

81 (3) The date, time, and place where qualifications must be
82 received.

83 (4) A description of the services to be procured, including a
84 facility profile with a detailed description of each building
85 involved and accurate energy consumption data for the most
86 recent 2 year period, stated objectives for the program, a list of
87 building improvements to be considered or required and a state-
88 ment as to whether the proposed improvements will generate suf-
89 ficient energy savings to fund the full cost of the program.

90 (5) The evaluation criteria for assessing the qualifications.

91 (6) A statement that the public agency may cancel the request
92 for qualifications, or may reject in whole or in part any and all

93 energy savings measures, when the public agency determines that
94 cancellation or rejection serves the best interests of the public.

95 (7) Any other stipulations and clarifications the public agency
96 may require, which shall be clearly identified in the request for
97 qualifications.

98 “Responsible”, demonstrably possessing the skill, ability and
99 integrity necessary to faithfully perform the work called for by a
100 particular contract, based upon a determination of competent
101 workmanship and financial soundness in accordance with the pro-
102 visions of section 44D of chapter 149.

103 (b) A public agency may enter into a guaranteed energy savings
104 contract in order to achieve energy savings at facilities in accord-
105 ance with this section.

106 (c) All energy savings measures shall comply with current
107 local, state, and federal construction and environmental codes and
108 regulations.

109 (d) Before entering into a guaranteed energy savings contract, a
110 public agency shall issue a request for qualifications. Public
111 notice of the request for qualifications shall conform to the proce-
112 dures set forth in subsection (1) of section 44J of chapter 149. At
113 least 1 week before soliciting a request for qualifications for a
114 guaranteed energy savings contract, a public agency shall notify
115 the commissioner of energy resources in writing, in a form and
116 including information as the commissioner of the division of cap-
117 ital asset management and maintenance shall prescribe by regula-
118 tion, of the agency’s intent to solicit qualifications. The
119 notification, at a minimum, shall include a copy of the agency’s
120 request for qualifications. An acknowledgment of receipt, in a
121 form and including information as the commissioner of the divi-
122 sion of capital asset management and maintenance shall prescribe
123 by regulation, shall be issued by the commissioner of energy
124 resources to the public agency upon successful compliance with
125 the requirements of this subsection. Qualifications shall be opened
126 publicly, in the presence of 2 or more witnesses, at the time speci-
127 fied in the request for qualifications, and shall be available for
128 public inspection. The provisions of sections 44A, 44B and 44E to
129 44H, inclusive, of chapter 149 shall not apply to contracts pro-
130 cured pursuant to this section. Section 44D of said chapter 149
131 shall apply as appropriate to qualifications submitted for contracts

132 under this section, and every such qualification shall be accom-
133 panied by (1) a copy of a certificate of eligibility issued by the
134 commissioner of the division of capital asset management, and
135 (2) by an update statement.

136 The public agency shall evaluate the qualified providers to
137 determine which best meets the needs of the public agency by
138 reviewing the following:—

139 (1) references of other energy savings contracts performed by
140 the qualified providers;

141 (2) the certificate of eligibility and update statement provided
142 by the qualified providers;

143 (3) quality of the products proposed;

144 (4) methodology of determining energy savings;

145 (5) general reputation and performance capabilities of the quali-
146 fied providers;

147 (6) substantial conformity with the specifications and other
148 conditions set forth in the request for qualifications;

149 (7) time specified in the qualifications for the performance of
150 the contract; and

151 (8) any other factors the public agency considers reasonable
152 and appropriate, which factors shall be made a matter of record.

153 Respondents shall be evaluated only on the criteria set forth in
154 the request for qualifications.

155 The public agency shall conduct discussions with, and may
156 require public presentations by, each person who submitted qualifi-
157 cations in response to the request for qualifications regarding
158 their qualifications, approach to the project, and ability to furnish
159 the required services. The public agency shall select in order of
160 preference 3 such persons, unless fewer persons respond, they
161 consider to be the most highly qualified to perform the required
162 services. The agency may request, accept, and consider proposals
163 for the compensation to be paid under the contract only during
164 competitive negotiations conducted pursuant to subsection (f).

165 (e) The public agency may cancel a request for qualifications,
166 or may reject in whole or in part any and all proposals when the
167 public agency determines that cancellation or rejection serves the
168 best interests of the public agency. The public agency shall state
169 in writing the reason for a cancellation or rejection.

170 (f) The public agency shall negotiate a contract with the most
171 qualified person at compensation which the public agency deter-
172 mines is fair, competitive, and reasonable. Should the public
173 agency be unable to negotiate a satisfactory contract with the
174 person considered to be the most qualified at a price the public
175 agency determines to be fair, competitive, and reasonable, negoti-
176 ations with that person shall be formally terminated. The public
177 agency shall then undertake negotiations with the second most
178 qualified person. Failing accord with the second most qualified
179 person, the public agency shall terminate those negotiations and
180 then undertake negotiations with the third most qualified person.
181 Should the public agency be unable to negotiate a satisfactory
182 contract with any of the selected persons, the public agency may
183 select additional qualified providers who responded to the request
184 for qualifications, in the order of their competence and qualifica-
185 tion, and continue negotiations in accordance with this subsection
186 until either an agreement is reached or the public agency cancels
187 the request for qualifications.

188 (g) The decision of a public agency as defined by section 1,
189 regarding the selection of a qualified provider shall be final and
190 not subject to appeal except on the grounds of fraud or collusion.

191 (h) The public agency shall provide public notice of the
192 meeting at which it proposes to award the guaranteed energy sav-
193 ings contract, of the name of the parties to the proposed contract,
194 and of the purpose of the contract. The public notice shall be
195 made at least 10 days before the meeting. The public agency shall
196 promptly publish in the central register notice of the award. The
197 public agency shall promptly publish in the central register notice
198 of the award and those public agencies other than state agencies
199 and building authorities shall notify the commissioner of energy
200 resources of such award and provide a copy of the guaranteed
201 energy savings contract.

202 (i) The guaranteed energy savings contract shall include a
203 written guarantee of the qualified provider that either the amount
204 of energy savings guaranteed will be achieved or the qualified
205 provider shall reimburse the public agency for the shortfall
206 amount. Methods for measurement and verification of guaranteed
207 savings shall conform to the most recent standards established by
208 the Federal Energy Management Program of the United States

209 Department of Energy. The commissioner of energy resources
210 shall enforce the requirements of this section and regulations pro-
211 mulgated hereunder as they relate to public agencies except for
212 state agencies and building authorities and shall have all the nec-
213 essary powers to require compliance therewith. The commissioner
214 of the division of capital asset management and maintenance shall
215 enforce the regulations as they relate to state agencies and
216 building authorities. Any order of the commissioner of energy
217 resources under this subsection shall be effective and may be
218 enforced according to its terms, and enforcement thereof shall not
219 be suspended or stayed by the entry of an appeal therefrom. The
220 superior court for Suffolk county shall have jurisdiction over
221 appeals of orders of the commissioner of energy resources under
222 this subsection, and shall also have jurisdiction upon application
223 of the commissioner to enforce all orders of the commissioner
224 under this subsection. The burden of proof shall be upon the
225 appealing party to show that the order of the commissioner is
226 invalid. An aggrieved person shall not be required to seek and
227 order from the commission as a condition precedent to seeking
228 any other remedy. The value of guaranteed savings may represent
229 either all, or part of annual payments at the discretion of the
230 agency. The guaranteed energy savings contract term for pro-
231 viding a guarantee, measurement and verification, maintenance,
232 service and installment or lease payments shall not exceed 20
233 years. The division of capital asset management and maintenance,
234 in concurrence with the state inspector general, shall promulgate
235 regulations for the procurement of energy management services,
236 including establishing safeguards to be included in guarantee
237 energy savings contracts. The regulations shall require the submis-
238 sion, at least annually, of information as the commissioner of the
239 division of capital asset management and maintenance and the
240 state inspector general consider necessary in order to monitor the
241 costs and benefits of contracts for energy management services.

242 (j) Payments under a contract for energy management services
243 may be based in whole or in part on any cost savings attributable
244 to a reduction in energy and water consumption due to the con-
245 tractor's performance or revenues gained due to the contractor's
246 services which are aimed at energy and water cost savings.

247 (k) Unless no other manner of description suffices, and the
248 public agency so determines in writing, setting forth the basis for
249 the determination, all requirements shall be written in a manner
250 which describes the requirements to be met without having the
251 effect of exclusively requiring a proprietary supply or service, or a
252 procurement from a sole source.

253 (1) Before entering into a guaranteed energy savings contract,
254 the public agency shall require the qualified provider to file with
255 the public agency a payment or a performance bond relating to the
256 installation of energy savings measures, in an amount equal to 100
257 per cent of the estimated contract value from a surety company
258 licensed to do business in the commonwealth and whose name
259 appears on United States Treasury Department Circular 570.

260 (m) Guaranteed energy savings contracts may extend beyond
261 the fiscal year in which they become effective.